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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

TRAVIS WIEBE, on behalf of himself and all others similarly situated, *Plaintiff*, v. NETFLIX, INC, WAL-MART STORES, INC., and WALMART.COM USA LLC, *Defendants*.	Case No. CV 09 **CLASS ACTION COMPLAINT** **DEMAND FOR JURY TRIAL**

Plaintiff Travis Wiebe, on behalf of himself and all others similarly situated, brings this action under Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1-2, and Sections 4 and 16 of the Clayton Antitrust Act, 15 U.S.C. §§ 15 & 29, for treble damages, injunctive and other relief against Defendants Netflix, Inc. ("Netflix"), Wal-Mart Stores, Inc. ("Wal-Mart Stores"), and Walmart.com USA LLC ("Walmart.com").

Based upon information and belief, and upon the investigation of counsel, Plaintiff alleges as follows:

Intermec Technologies Corp. v. Palm, Inc.
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NATURE OF THE ACTION

1. This case is brought as a class action on behalf of all consumers in the United States who, during the period of May 19, 2005 to the present (the "Class Period"), paid a subscription fee to rent Digital Video Discs or Blu-ray Discs containing commercially recorded entertainment programs for personal viewing ("DVDs") from Netflix.

Dockets.Justia.com

2. On or about May 19, 2005, Netflix, Wal-Mart Stores, and Walmart.com, a wholly owned subsidiary of Wal-Mart Stores, entered into an agreement to divide the markets for the sales and online rentals of in the United States with the purpose and effect of monopolizing and unreasonably restraining trade in the online DVD rental market (hereinafter referred to as the "Market Division Agreement").

3. The meetings which lead to the conspiracy began in January 2005, when Reed Hastings, the CEO of Netflix, and John Fleming, then the CEO of Walmart.com, met with each other to discuss how they could reach an agreement that would reduce or eliminate competition in the online DVD rental and DVD sales markets. At the time of their initial meeting and prior to entering into the Market Division Agreement, Netflix and Walmart.com were direct competitors in renting DVDs online and all three Defendants were potential competitors in selling new DVDs to consumers.

4. Despite being direct competitors, on or around May 19, 2005, Defendants entered into an agreement to restrain trade and eliminate competition by which: 1) Walmart.com would stop competing with Netflix in the online DVD rental business; 2) Netflix would promote the sales of new DVDs by Wal-Mart Stores and Walmart.com; and 3) Netflix would not enter the business of selling new DVDs.

5. Since entering into the Market Division Agreement, neither Wal-Mart Stores nor Walmart.com has participated in the online DVD rental market and Netflix has not sold new DVDs. The Market Division Agreement has entrenched and enhanced Defendants' dominant positions in their respective markets and otherwise harmed competition.

6. As a result of Defendants' contract, combination, and conspiracy as well as Netflix's unlawfully acquired and maintained market and monopoly power, Netflix overcharged Plaintiff, and millions of class members similarly situated, by charging them higher subscription prices for online DVD rentals that it otherwise would have absent Defendants' illegal agreement.

PLAINTIFF

7. Plaintiff Travis Wiebe is an individual consumer who resides in Washington, D.C. During the Class Period, Plaintiff directly subscribed to Netflix for his personal, non-commercial use. The

subscription fees Plaintiff paid to Netflix for renting DVDs were greater than he would have paid, but for the antitrust violations alleged herein.

DEFENDANTS

8. Defendant Netflix is a Delaware corporation headquartered at 100 Winchester Circle, Los Gatos, California, 95032. Netflix is a publicly traded company whose revenues exceed $1 billion annually. Throughout the Class Period, Netflix has possessed a dominate market share of the online DVD rental market in the United States. Through its website, www.netflix.com, Netflix rents DVDs directly to consumers nationwide by charging monthly subscription fees, which entitle consumers to rent DVDs.

9. Defendant Wal-Mart Stores, Inc. ("Wal-Mart Stores") is a Delaware corporation headquartered at 702 S.W. 8th Street, Bentonville, Arkansas, 72716. Wal-Mart Stores is a publicly traded company whose revenues approach $400 billion annually. Through its retail stores and its website, www.walmart.com, Wal-Mart Stores sells DVDs directly to consumers nationwide. Wal-Mart Stores is the largest retailer in the United States and sells more DVDs than any other domestic retailer. Wal-Mart Stores was entirely involved in the conspiracy alleged and described in greater detail herein.

10. Defendant Walmart.com USA LLC ("Walmart.com") is a Delaware company with its headquarters at 7000 Marina Boulevard, Brisbane, California, 94005. Walmart.com is a wholly-owned subsidiary and online component of Defendant Wal-Mart Stores.

11. For purposes of these allegations, both Wal-Mart Stores and Walmart.com are active participants in the conspiracy and each is liable for the unlawful conduct alleged herein, with each, among other things, participating in and benefiting from, the Market Division Agreement. Moreover, Wal-Mart Stores directed, ratified, approved, supported, and otherwise aided and abetted Walmart.com's violations of law.

12. Whenever reference is made in this Complaint to a statement or transaction of any corporation or entity, the allegation means that the corporation or entity acted by or through its directors, members, partners, officers, employees, affiliates, or agents, while engaged in the

management, direction, control, or conduct of the corporation's or entity's business and acting within its scope of authority.

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337, and pursuant to 15 U.S.C. §§ 1-2, 15 and 26.

14. The requirements of the Class Action Fairness Act of 2005, 28 U.S.C. §1332(d) are satisfied in that (1) the members of the class exceed 100; (2) the citizenship of at least one Plaintiff is different from that of any Defendant; and (3) the matter in controversy, after aggregating the claims of the proposed class members, exceeds $5,000,000, exclusive of interest and costs.

15. Venue is proper in this District pursuant to 28 U.S.C. §§ 15, 22 and 26, and pursuant to 29 U.S.C. § 1391(b), (c), and (d), because during the Class Period: (1) one or more of the Defendants transacted business, were found in or acted through subsidiaries or agents present in this District; (2) a substantial part of Plaintiffs' claims occurred in this District; and (3) a substantial portion of the affected interstate trade and commerce described below has been carried out in this District.

INTERSTATE TRADE AND COMMERCE

16. Defendants' conduct has taken place within the flow of, and substantially affected the interstate commerce of the United States. Defendants have sold and/or rented DVDs throughout the United States, involving hundreds of millions of dollars in interstate commerce, and used the instrumentalities of interstate commerce, including interstate wires and the U.S. mail, to sell and/or to rent DVDs throughout the United States.

CLASS ACTION ALLEGATIONS

17. Plaintiff brings this action on his own behalf and as a class action on behalf of all members of the following Class:

> Any person in the United States that paid a subscription fee to Netflix to rent DVDs, on or after May 19, 2005 through the present. Excluded from the Class are all federal, state, or local governmental entities, Defendants, their co-conspirators and their representatives, parents, subsidiaries and affiliates.

18. Plaintiff reserves the right to amend the definition of the Class upon filing a motion for class certification.

19. There are questions of law and fact common to the Class, including, but not limited to:

a. Whether Defendants engaged in a contract, combination, or conspiracy to allocate markets;

b. Whether Defendants unreasonably restrained trade in the Online DVD Rental Market (as defined *infra*);

c. Whether Defendants had the specific intent for Netflix to monopolize the Online DVD Rental Market (as defined *infra*);

d. The nature and character of the acts performed by Defendants in the furtherance of the alleged contract, combination, and conspiracy;

e. Whether the alleged contract, combination, and conspiracy violated federal antitrust laws;

f. The anticompetitive effects of Defendants' violations of law; and

g. Whether the Defendants' alleged conduct caused Netflix subscription fees to be higher than they otherwise would have been, and thereby caused injury to the business and property of Plaintiff and other members of the Class.

20. Plaintiff does not know the exact size of the Class at the present time. However, due to the nature of the trade and commerce involved, there are millions of class members, geographically dispersed throughout the United States such that joinder is impractical.

21. Plaintiff's claims are typical of the claims of members of the Class and are coincident with, and not antagonistic to, those of the members of the Class. Plaintiff has retained competent counsel experienced in class action and complex antitrust and consumer protection litigation.

22. Plaintiff will fairly and adequately represent the interests of members of the Class.

23. Class action treatment is a superior method for the fair and efficient adjudication of this controversy because:

a. It will avoid a multiplicity of suits and consequent burden on the parties and the courts;

b. It would be impracticable for all members of the Class to intervene as parties-plaintiff in this action;

c. It will allow numerous individuals with claims too small to adjudicate on an individual basis to obtain redress for their economic injuries; and

d. It will allow numerous individuals to adjudicate their claims in a single forum simultaneously, efficiently, and without duplication of effort and expense that numerous individual actions would engender.

THE ONLINE DVD RENTAL MARKET

24. The online DVD rental market refers to the rental of DVDs online by subscription for delivery by mail in the United States ("Online DVD Rental Market" or "Relevant Market"). At all relevant times, there have been no reasonably interchangeable substitutes for this service, which is differentiated from other methods of DVD distribution and other entertainment content delivery.

25. The geographic market for the Online DVD Rental Market is the United States. Shipping costs and transglobal differences in DVD data encoding, among other reasons, make it neither practical nor feasible for entities located in other countries to rent DVDs to consumers in the United States.

26. In the Online DVD Rental Market, consumers rent DVDs from an online service provider, such as Defendant Netflix and (previously) Defendant Walmart.com. Online service providers typically will not charge a late fee or set return dates, and the consumer typically pays a subscription fee regardless of the number of DVDs that are rented per month. Once subscription fees are established, they are not altered based on usage (i.e. rate of rentals). As a result, consumers who do not rent DVDs for months are still charged the same monthly subscription fee.

27. To rent DVDs online, a consumer must first open an account with an online service provider. Once an account is open, subscribers fill out a rental "queue" in a profile created with their respective provider. In this queue, the subscriber lists, in order of preference, the DVDs they wish to rent. The DVDs are then mailed to the subscriber's home address via U.S. mail by the provider. Included in this delivery is a prepaid envelope by which the subscriber can return the DVD to the provider. Once a DVD is returned, the service provider will mail the next movie on the subscriber's queue. The library of titles available from online service providers has grown over time and offers a far larger selection of titles than those stocked and available at any single bricks-and-mortar video rental store.

The Online DVD Rental Market is a Distinct Market

28. The online rental market is recognized as a distinct market by the public and the industry, including by Defendants.

29. Defendants have confirmed and recognized the existence of a discrete online DVD rental market. Netflix CEO, Reed Hastings, told the Wall Street Journal that other types of rental services do not present a direct competitive threat to Netflix. While Hastings has publicly acknowledged that other forms of viewing movies at home, including through online video downloads, may become a competitive force in the future, DVD will remain the dominant medium for years to come.

30. Online DVD rentals are a differentiated service that is not reasonably interchangeable with traditional bricks-and-mortar video rental. In traditional bricks-and-mortar rentals, consumers drive to or otherwise arrive at a store, find what they are looking for, and typically pay on a per-per-DVD basis for a fixed period of time. After the designated rental period of one or more days, a period that usually depends upon the release date of the DVD, the consumer returns their selection. If the DVD is returned late, additional fees may be assessed. There are no such late fees or due dates in the Online DVD Rental Market.

31. Rentals made through the Online DVD Rental Market differ from rentals made in-store in a number of ways, including, *inter alia*:

a. Consumers are not required to travel to a store to purchase and return DVD rentals;

b. Rentals are available to anyone with a United States postal address, regardless of proximity to a store;

c. Costs are based on a set subscription rate;

d. Consumers are provided a much wider selection of titles than available at a brick-and-mortar store; and

e. There are no set timeframes for rentals to be returned and therefore no corresponding late fees.

For these reasons, among others, rentals made in the Online DVD Rental Market are not reasonably interchangeable with DVD rentals made in-store.

32. Similarly, other modes of content distribution, such as kiosk rentals, video-on-demand, and video downloading are not reasonably interchangeable with online DVD rentals for a number of reasons, including:

a. Availability during the Class Period;

b. A lack of relative selection and convenience for consumers;

c. Differences in pricing; and

d. Licensing considerations and technological limitations from the supply perspective.

33. Online DVD rentals are a separate market from DVD sales. While DVD sales result in ownership of a good, DVD rentals result in no ownership and require return. In addition, the pricing for DVD sales and online DVD rentals rely on different pricing considerations. For example, the price to buy a new DVD depends, in part, on a movie's popularity, release date, original success at the box office or on television, etc. By contrast, online DVD providers generally charge a fixed subscription fee for all rentals.

34. The home entertainment industry and the public at-large perceive online DVD rentals as separate from DVD sales. Factors motivating a consumer to buy a DVD are different from those motivating a consumer to rent a DVD. DVD sales and online rentals are not reasonably interchangeable for consumers intending to collect physical DVDs or to give a DVD as a gift. The cross-elasticity of demand between these products is such that a significant non transitory increase in price would not cause consumers to switch from online renting to purchasing DVDs and vice versa.

35. Direct price competition does not exist between online DVD rental services and other forms of DVD rentals. For example, online DVD rentals are generally priced on a monthly subscription basis. Subscription rates are independent of the number of DVDs a customer actually rents in a month. Whereas other forms of DVD rentals (i.e. in-store rentals, kiosks, and video downloading) are generally priced on a pay-per-view basis or by local in-store prices and competition.

Competition in the Online DVD Rental Market

36. During the Class Period, Netflix maintained a dominate position in the Online DVD Rental Market. For example, in 2008 Netflix maintained an approximate 72% market share. As a result of its dominate position, Netflix has had and continues to have market and monopoly power in the Online DVD Rental Market.

37. Walmart.com is one of the largest online retailers in the United States whose business includes the sale of DVDs directly to consumers nationwide. Consumers who purchase DVDs via www.walmart.com may have them either delivered to them by mail, or may pick them up at a Wal-Mart Stores retail location via Walmart.com's and Wal-Mart Stores' "Site to Store" program. Wal-Mart Stores and Walmart.com lead the DVD sales industry and combined control approximately 40% of DVD retail sales in the United States. Total revenue from such sales amounts to over $25 billion over the period of 2005 through 2008.

38. Prior to the conspiracy alleged herein, Walmart.com was a major competitor of Netflix in the online DVD rental market through the "Walmart DVD Rentals" service, which was available on www.walmart.com. Walmart.com serves as the internet sales channel for Wal-Mart Stores and not as an independent sales entity. Wal-Mart Stores and Walmart.com are held out to the public as a single retailer entity. In addition, Wal-Mart Stores is the registrant of the domain names "www.walmart.com" and "www.walmartdvdrentals.com" and is generally credited with any redesign or other significant changes in Walmart.com's format, content or general appearance.

39. Prior to the Market Division Agreement, the Online DVD Rental Market was composed of three main competitors: Netflix, Walmart DVD Rentals, and Blockbuster. Since the implementation of the Agreement between Netflix and Wal-Mart Stores (and its online component Walmart.com), Netflix's primary competitor has been Blockbuster, whose market share accounts for approximately 25% of the Online DVD Rental Market. The remaining 1-2% of the market is controlled by several small companies.

40. There are substantial barriers to entry into the Online DVD Rental Market. Online DVD rental operations are capital intensive and a market participant must operate on a large scale to be successful.

41. Since 2006, Netflix has achieved substantial growth in subscribers and revenue. Paying subscribers increased from 5.1 million in 2006, to 8.3 million in 2008 (a 63% increase). Revenues increased from $997 million in 2006, to $1.4 billion in 2008 (a 40% increase).

42. In mid-2004, Netflix's base monthly subscription rate was $21.99. In August 2004, Blockbuster entered the online DVD rental market and offered its subscribers a base monthly subscription rate of $19.99 per month. Walmart DVD Rentals' comparable rate over the same period was $18.86.

43. By October 2004, faced with increased competition and rumors that Amazon.com would soon offer a competing online DVD rental service, shares of Netflix stock had plummeted from a high of near $40 to under $10 per share.

44. Faced with these circumstances, Netflix lowered its base monthly subscription rate to $17.99 per month, followed immediately by Blockbuster lowering its rate to $17.49, and Walmart DVD Rentals lowering its rate to $17.36. This rate reduction by Netflix was widely seen as erasing the company's recent profits, and signaled that it was merely trying to break even as aggressive price competition began to define the Online DVD Rental Market.

45. In December 2004, Blockbuster again lowered its already reduced base monthly subscription rate from $17.49 to $14.99.

46. In January 2005, Walmart DVD Rentals had cuts its rate from $17.36 to $12.97. Netflix faced growing pressure due to both increased competition and a continued decline in its share price.

Defendants' Illegal Agreement

47. By 2005, Wal-Mart Stores and Walmart.com had established themselves as leaders in the sale of new DVDs. However, this position was increasingly being challenged by competitors, including Amazon.com. Netflix, with a customer base of DVD renters considered to be prolific buyers of new DVDs, had positioned itself to become a significant competitor in the sale of new DVDs.

48. Faced with increasing competition, Defendants agreed to conspire to reduce and eliminate competition in the Online DVD Rental Market in exchange for Netflix not entering the market for the sale of new DVDs.

49. The meetings that lead to this conspiracy began in January 2005, when Reed Hastings, the CEO of Netflix, and John Fleming, then CEO of Walmart.com, met for dinner to discuss the Online DVD Rental Market and new DVD sales market. According to Hastings, he had "noticed how low Wal-Mart's prices [for DVDs] were" and so "called the CEO of [Walmart.com] in January and asked if he could have dinner." Fleming, who at the time reported directly to Wal-Mart Stores CEO Lee Scott, accepted the invitation and the two met.

50. As a result of the meetings and exchanges that followed, Defendants entered into the contract, combination, and conspiracy to restrain trade and eliminate competition by which: 1) Walmart.com would stop competing with Netflix in the online DVD rental business; 2) Netflix would promote the sale of new DVDs by Wal-Mart Stores and Walmart.com; and 3) Netflix would not sell new DVDs, effectively conceding the market to Wal-Mart Stores and Walmart.com.

51. On May 19, 2005, Defendants issued a joint press release which in effect outlined the terms of the Market Division Agreement. Beginning the same date, Walmart.com was to (and in fact did) exit the online DVD rental business. All existing subscribers to Wal-Mart DVD Rentals were offered the option of a one year subscription to Netflix at their current Wal-Mart DVD Rentals subscription rate. Walmart.com added a prominently placed link on its website to encourage Wal-Mart customers to transfer subscriptions or otherwise join Netflix.

52. Since the May, 15, 2005 joint announcement (apart from the 30 days Walmart.com used to wind down its existing online DVD rental business), neither Wal-Mart Stores nor Walmart.com have participated in the Online DVD Rental Market and Netflix has not sold new DVDs.

53. As a result of the Market Division Agreement, the downward pricing pressure from Walmart.com was removed, and the Online DVD Rental Market was reduced to two primary competitors: Netflix and Blockbuster.

54. In August 2005, Blockbuster raised its base monthly subscription rate from $14.99 to $17.99, the same rate charged by Netflix at the time.

ANTICOMPETITIVE EFFECTS

55. Defendants' illegal acts and practices have caused anticompetitive effects in the Online DVD Rental Market. The subscription fees charged by Netflix to Plaintiff and members of the Class were maintained at artificially high and supra-competitive levels. Plaintiff and the other members of the Class paid higher subscription prices to Netflix than they otherwise would have paid.

56. The Market Division Agreement: 1) eliminated one of only three significant competitors in the Relevant Market; 2) eliminated competition between Defendants; and 3) enabled Netflix to acquire and maintain market and monopoly power in the Online DVD Rental Market.

57. The Market Division Agreement has enabled Netflix to implement monopolistic and supra-competitive pricing in the Online DVD Rental Market.

58. The Market Division Agreement and Defendants' acts and practices in furtherance thereof have no pro-competitive benefits. They do not create information that consumers need, nor do they create new or better products or services. Rather, Defendants' acts have served to reinforce the anticompetitive nature of the Market Division Agreement by assuring, *inter alia*, that Walmart.com not only withdrew from the Online DVD Rental Market but also further enhanced Netflix's position in that market.

59. To the extent the Agreement may have created any pro-competitive benefits, those benefits: 1) could have been achieved by less restrictive means and 2) would not be outweighed by the anticompetitive effects created by the Agreement.

60. During the Class Period, Plaintiff and the members of the Class have directly paid monthly DVD subscription fees to Netflix in the United States, and continue to do so. As a result, Plaintiff and the members of the Class have suffered, and continue to suffer, injury of the type that the antitrust laws are designed to punish and prevent.

61. Plaintiff and the members of the Class have paid, and continue to pay, more to subscribe to Netflix than they would have, absent the Market Division Agreement. As a direct and proximate

result of the unreasonable restraint of trade and market and monopoly power created by the Market Division Agreement, Plaintiff and the members of the Class were, and continue to be, injured and financially damaged in their businesses and property, in amounts that are not presently determined.

COUNT ONE
SHERMAN ACT SECTION ONE (15 U.S.C. §1)
Illegal Market Division
(Against All Defendants)

62. Plaintiff hereby incorporates by reference each of the preceding paragraphs as if fully set forth herein.

63. Defendants have entered into market division agreement in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. §1.

64. Prior to and at the time of the Agreement, Netflix and Walmart.com were actual competitors in the Online DVD Rental Market.

65. Prior to and at the time of the Agreement, Netflix was a potential competitor with Wal-Mart Stores and Walmart.com in new DVD sales business. But for the Market Division Agreement, Netflix possessed the means and economic incentive to compete in the sale of new DVDs against already existing market participants Wal-Mart Stores and Walmart.com.

66. Defendants shared a conscious commitment to a common scheme designed to achieve the unlawful objective of dividing the markets for online DVD rentals and new DVD sales. The Market Division Agreement allocated the Online DVD Rental Market to Netflix, with Wal-Mart Stores and Walmart.com agreeing not to compete in that Relevant Market.

67. The Agreement also allocated new DVD sales to Wal-Mart Stores and Walmart.com, with Netflix agreeing to refrain from competing in the sale of new DVDs. In addition to explicitly or de facto agreeing not to sell new DVDs, Netflix also agreed to promote new DVD sales by Wal-Mart Stores and Walmart.com. Accordingly, Netflix provided significant consideration to Wal-Mart Stores and Walmart.com for their agreement that Walmart.com would withdraw from, and both Walmart.com and Wal-Mart Stores would not compete in, the Online DVD Rental Market.

68. The Market Division Agreement has created significant anticompetitive effects and no pro-competitive benefits. The Agreement eliminated competition in the Relevant Market, with the effect of raising prices paid by consumers. To the extent the Agreement may have created any pro-competitive benefits, those benefits: 1) could have been achieved by less restrictive means and 2) would not be outweighed by the anticompetitive effects created by the Agreement.

69. As a result of this violation, the subscription prices Netflix charged to, and which were paid by Plaintiff and the members of the Class, were and continue to be higher than they otherwise would have been.

COUNT TWO
SHERMAN ACT SECTION TWO (15 U.S.C. §2)
Monopolization of Online DVD Rental Market
(Against Netflix)

70. Plaintiff hereby incorporates by reference each of the preceding paragraphs as if fully set forth herein.

71. Netflix has monopoly power in the Online DVD Rental Market.

72. Netflix willfully acquired and maintained its monopoly in the Online DVD Rental Market by its acts and practices as described herein, including the executing, implementing, and otherwise complying with the Market Division Agreement in violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. §2.

73. As a result of this violation, the subscription prices Netflix charged to, and which were paid by Plaintiff and the members of the Class, were and continue to be higher than they otherwise would have been.

COUNT THREE
SHERMAN ACT SECTION TWO (15 U.S.C. §2)
Attempt to Monopolize Online DVD Rental Market
(Against Netflix)

74. Plaintiff hereby incorporates by reference each of the preceding paragraphs as if fully set forth herein.

75. If Netflix does not already have monopoly power, then Netflix has a dangerous probability of success in achieving monopoly power in the Online DVD Rental Market.

76. With the specific intent to achieve a monopoly, Netflix, by its acts and practices described herein, including by executing, implementing, and otherwise complying with the Market Division Agreement, has attempted to monopolize the Online DVD Rental Market, in violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. §2.

77. As a result of this violation, the subscription prices Netflix charged to, and which were paid by Plaintiff and the members of the Class, were and continue to be higher than they otherwise would have been.

COUNT FOUR
SHERMAN ACT SECTION TWO (15 U.S.C. §2)
Conspiracy to Monopolize Online DVD Rental Market
(Against Netflix)

78. Plaintiff hereby incorporates by reference each of the preceding paragraphs as if fully set forth herein.

79. Defendants shared a conscious commitment to a common scheme designed to achieve the unlawful objective of monopolization of the Online DVD Rental Market. Prior to and at the time of the Agreement, Netflix and Walmart.com were actual competitors in the Online DVD Rental Market. Defendants conspired with the specific intent, knowledge and purpose that their anticompetitive agreement would result in Netflix willfully acquiring and maintaining a monopoly in the Relevant Market.

80. Defendants knew that the natural and probable consequence of the Market Division Agreement would be the monopolization of the Relevant Market by Netflix. Defendants have committed overt acts in furtherance of their conspiracy, including entering into, complying with, and implementing the Market Division Agreement, in violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. §2.

81. As a result of this violation, the subscription prices Netflix charged to, and which were paid by Plaintiff and the members of the Class, were and continue to be higher than they otherwise would have been.

JURY DEMAND

82. Pursuant to Rule 38(a) of the Federal Rules of Civil Procedure, Plaintiff demands a jury trial of all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that:

A. The Court determine that this action may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, that Plaintiff be appointed class representative, and that Plaintiff's counsel be appointed as counsel for the Class.

B. Defendants be adjudged to violate Sections 1 and 2 of the Sherman Antitrust Act of 1890, 15 U.S.C. §§1-2.

C. The Court declare the Market Division Agreement between Defendants announced May 19, 2005, to be unlawful, null and void.

D. Judgment be entered for Plaintiff and the members of the Class against Defendants, jointly and severally, for three times the amount of damages sustained by Plaintiff and the members of the Class, under Section 4 of the Clayton Antitrust Act of 1914, 15 U.S.C. §15, together with the costs of the action, including reasonable attorneys' fees, and such other relief as is appropriate.

E. Defendants, their affiliates, successors, transferees, assignees, and the officers, directors, partners, agents and employees thereof, and all other persons acting or claiming to act on their behalf, be permanently enjoined and restrained from, in any manner, continuing, maintaining or renewing the contract, combination or conspiracy alleged herein, or from engaging in any other contract, combination or conspiracy having similar purpose or effect, and from adopting or following any practice, plan, program or device having a similar purpose or effect, pursuant to Section 16 of the Clayton Antitrust Act of 1914, 15 U.S.C. §29.

F. Plaintiff and the members of the Class reserve such other, further, and different relief as the case may require and the Court may deem just and proper under the circumstances.

Dated: March 24, 2009

Respectfully submitted,

By: [signature]

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